

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY
COMPANY, a Corporation,
Plaintiff in Error,
vs.
H. E. FOLEY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

H. A. ELLIOTT, Esq., Clifton, Arizona,
Messrs. HAWKINS & FRANKLIN, El Paso,
Texas,

Attorneys for Plaintiff in Error.

L. KEARNEY, Esq., Clifton, Arizona,
Attorney for Defendant in Error.

In Justice Court No. One Precinct, County of
Greenlee, State of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff above named complains of defendant
and alleges as follows:

I.

That defendant during the time hereinn men-
tioned has been, and yet is, a railroad corporation,
duly incorporated under the laws of the Territory
(now State) of Arizona, and doing business as such
under its corporate name, "THE ARIZONA AND
NEW MEXICO RAILWAY COMPANY."

II.

That defendant is now and was, during the time
hereinafter mentioned, engaged in the business of
running and operating a railroad from the town of

Clifton, Arizona, to Hachita, New Mexico, a distance of 109 miles, which railroad is equipped, owned and conducted by defendant, and that defendant was, and yet is, a common carrier of freight and passengers for hire, and as such common carrier operated and operates freight and passenger trains for hire, in, on, over, and through said railroad, between said points, and during the times herein mentioned was engaged in interstate commerce on, over and through said line of railroad, and that it employs a large number of brakemen and other employees, whose business it was and is to run and operate said trains for hire, and were at the times and places herein mentioned engaged in interstate commerce on said railroad for defendant. [1*]

III.

That from the 31st day of December, 1916, to the 1st day of May, 1917, the plaintiff rendered 105 days' work to the defendant, which said 105 days' work were performed at the request of the defendant and upon its employment as brakeman on its trains on said line of railroad, in said interstate commerce, between said Clifton and Hachita:

IV.

That plaintiff as said brakeman, on defendant's said railroad, between said points, rendered to defendant on each of said 105 days' work, from 10 to 11 hours work each day.

That on December 31, 1916, and January 1st, 1917, the time of the beginning of said services, the

*Page-number appearing at foot of page of original certified Transcript of Record.

wages for brakemen on said railroad was at the rate of 52 cents per hour for ten hours' work.

That the Congress of the United States of America, on September 3d, 1916, passed a certain law, known as the "Adamson Act," which provided that said act should take effect and begin on January 1st, 1917, and which said act provided that eight hours, in contracts for labor and services, shall be deemed a day's work upon any railroad that is a common carrier and engaged in interstate commerce, and that for such eight hours' work the compensation of the employee shall not be diminished and that he shall receive the same pay per day as he had received for a ten hour work day.

That the said "Adamson Act" further provided that pending the report of the Commission therein provided for and for a period of thirty days thereafter, the compensation of railway employees subject to said act for a standard eight-hour work day shall not be reduced below the present standard days' wage, and for all necessary time in excess of eight hours such employee shall be paid at a rate not less than the *pro rata* for such standard eight-hour work day. [2]

That under the said eight-hour work day law, the employee would receive the same amount of wages as though he had worked a ten-hour day, and under the said ten-hour work day the plaintiff was receiving and being paid at the rate of 52 cents per hour, and under the eight-hour work day his compensation would be 65 cents per hour.

That when said "Adamson Act" became law the

defendant refused to recognize or be bound by it, and ever since has refused to recognize it as law or be governed by its terms and conditions, and compelled the plaintiff to work from 10 to 11 hours each day as brakeman aforesaid, and paid plaintiff the old rates existing under said ten-hour work day, at 52 cents per hour, when defendant should have paid plaintiff for all work done by him as aforesaid at the rate of 65 cents per hour, and that defendant refused to pay plaintiff according to the provisions of said "Adamson Act."

That plaintiff during said 105 days' work performed 231 hours work over and above said eight hour work day, and that defendant has refused to pay plaintiff for said 231 hours of extra labor performed over and above the said standard eight-hour work day, although it has been requested to pay the same.

That under the provisions of said "Adamson Act" the defendant owes the plaintiff for said 231 hours' labor at the rate of 65 cents per hour, or the sum of \$150.00.

The defendant is indebted to plaintiff in the sum of \$150.00 for said 231 hours of extra work, the same being at the rate of 65 cents per hour; all of which is long past due, and no part thereof has ever been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of one hundred and fifty (\$150.00) dollars, with legal interest; together with the cost of this action.

L. KEARNEY,

Attorney for Plaintiff. [3]

CLERK'S NOTE: The foregoing complaint is a part of the certified copy of the Record on Removal, which record was sent to the District Court of the United States by the aforesaid Justice of the Peace Court, and is endorsed as follows:

No. 110—Tucson. In the United States District Court for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Certified Copy of Record on Removal. Filed this 26th day of June, A. D. 1917. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. Hawkins & Franklin, Postoffice Address, El Paso, Texas. H. A. Elliott, Postoffice Address, Clifton, Arizona, Attorneys for Defendant. [4]

In the United States District Court for the District of Arizona, Tucson Division.

No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Answer.

Comes now The Arizona & New Mexico Railway Company, a corporation, the defendant above named, by its attorneys with this, its answer to plaintiff's complaint on file herein, and demurs

thereto and for ground of demurrer alleges and shows the Court:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment as to the insufficiency of said complaint and for its costs.

HAWKINS & FRANKLIN,
H. A. ELLIOTT,

Attorneys for Defendant.

Furthering answering said complaint, and by way of answer thereto,

II.

Defendant denies generally and specifically each and every, all and singular, the allegations in said complaint contained.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by his said action, and that it be hence dismissed with its costs in this behalf expended, and [5] whatever other relief may be deemed meet and proper by this Court.

HAWKINS & FRANKLIN,
H. A. ELLIOTT,

Attorneys for Defendant.

[Endorsed]: Filed this 25th day of July, 1917.
Mose Drachman, Clerk. By Anna L. Ross, Deputy.

[6]

In the United States District Court in and for
the District of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Agreed Statement of Facts.

Under and pursuant to the provisions of paragraph 510 of the Revised Statutes of the State of Arizona, 1913, Civil Code, it is hereby stipulated and agreed by and between H. E. Foley, the plaintiff above named, by his counsel, L. Kearney and F. E. Curley, and The Arizona and New Mexico Railway Company, a corporation, defendant above named, by its counsel, H. A. Elliott, that the matter in controversy in the above-entitled case be submitted upon an agreed statement of facts, and to that end said respective parties by their counsel above named, do hereby make and agree upon the following statement of facts, upon which facts judgment shall be rendered herein, to wit:

I.

Plaintiff is a citizen of the United States and a resident of the town of ———, State of California.

II.

Defendant is a railroad corporation organized and existing under and by virtue of the laws of the States of Arizona and New Mexico, and operates a

railroad as a common carrier for hire from the town of Clifton, Greenlee County, State of Arizona, through the town of Lordsburg, Grant County, New Mexico, to the town of Hachita, last named county and state; that defendant's said railroad is 111.94 miles in length. That defendant operates freight and passenger trains and employs engineers, firemen, conductors and brakemen and other servants to operate said trains. [7]

III.

That plaintiff entered the employ of defendant on the sixth day of August, 1916, and continued in such employment to and until the 27th day of April, 1917, and during said period was employed by defendant as a brakeman in interstate commerce.

IV.

That the engineers and firemen, the employees of this defendant company, are, and at all times mentioned herein were members of the Brotherhood of Locomotive Engineers and Firemen; that the conductors and brakemen, employees of this defendant company are, and at all times herein mentioned were members of the Brotherhood of Railroad Trainmen; that during the said period of plaintiff's employment by defendant, plaintiff was a member of said Brotherhood of Railroad Trainmen.

V.

That effective the first day of April, 1911, a schedule of wages and contract of employment were agreed upon and executed by and between this defendant company and the conductors and brakemen

in the employ of the company and the Brotherhood of Trainmen, representing and binding the conductors and brakemen of this defendant, which said schedule and contract of employment are in words and figures as follows, to wit:

“SCHEDULE OF PAY AND REGULATIONS
FOR CONDUCTORS AND BRAKEMEN,
ARIZONA & NEW MEXICO RAILWAY
COMPANY.

The following rates of pay and regulations will govern the employment and compensation of conductors and brakemen in the service of The Arizona & New Mexico Railway Company, and will be in effect from April 1, 1911. No revision or abrogation of this agreement will be made without at least thirty (30) days in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

Section 1. Rates of pay in passenger service will be: Conductors, \$182.00 per month with overtime at 60 cents per hour. Brakemen, \$117.00 per month, with overtime at 38 cents per hour. Overtime to commence one hour after schedule—first hour not to be counted. Calendar days shall constitute a month. The regular crew will be guaranteed a full month's pay, provided they lose no [8] time on their own account.

Note: Trainmen not working a full month will be paid at a daily rate for the services performed.

Daily rate will be determined by dividing the

monthly rate by the number of days in the month during which the time is earned.

Section 2. Rates of pay in freight service will be: Conductors, \$140.00 per month. Brakeman 42 cents per hour. Calendar working days to constitute a month. Overtime after ten (10) hours at *pro rata* rates.

It is agreed that the oldest freight crews will be kept in service at all times and receive a full month's pay. Extra crews to be paid proportionately for the amount and class of service performed.

Section 3. Rates of pay in work train service will be: Conductors \$140.00 per month. Brakemen \$107.50 per month. Calendar working days to constitute a month. Overtime after ten (10) hours at *pro rata* rates.

ARTICLE II.

Section 1. In all branches of train service in computing overtime; less than thirty (30) minutes will not be counted.

Thirty (30) minutes or more will constitute an hour and hour for hour thereafter.

Section 2. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

Section 3. Trainmen run from terminal to terminal or a lesser distance with an extra or special passenger train and doubling back with freight train or *vice versa*, will be paid one passenger day and overtime for the special and in addition one

freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence thirty minutes after arrival at turning point unless leaving time is earlier.

Section 4. When necessary to run pilots, trainmen shall be employed as such, when available, and will receive freight conductors pay.

Section 5. Trainmen deadheading at the request of the company will be paid full time at the regular rate applicable to the service in which they are regularly employed.

Section 6. Trainmen on court duty for the company will be paid for full time lost and will be allowed their necessary expenses while away from home, same to be certified to by the attorney for the company. Extra trainmen shall receive not less than one day's pay and the necessary expenses for each twenty-four hours serving on court duty.

Section 7. Trainmen who are called and whose services [9] are not wanted, and who are held on duty five hours or less, shall be paid one-half day's pay. If held more than five hours and not over ten they shall receive one day's pay. If held over ten hours, they will be paid therefor at regular overtime rates.

Section 8. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness shall receive one-half day's pay for the first five

hours or less. If more than five hours, one day will be allowed and overtime if same is earned by other members of the crew.

Section 9. When time slips turned in by trainmen are not allowed they shall be so notified and same immediately returned for correction, and full explanation will be given why same are not allowed.

Section 10. When crews are required to accompany specials or for any other purpose leave the home line or division in charge of, or with a train, they shall receive actual time made as per Article 1, Section 1, and the sum of \$2.50 per day for expenses.

ARTICLE III.

Section 1. The time of trainmen will begin at the time set for departure of their train, or time of departure if earlier, and time will be allowed on date train leaves terminal. If held in yard switching, or for any other cause, they will be allowed one hour terminal overtime for the first thirty (30) minutes and additional overtime for each succeeding hour. Overtime to be paid at regular overtime rates.

Section 2. Trainmen required to remain on duty switching or for any other cause after arriving at terminal stations, will be allowed one hour terminal overtime for the first thirty minutes and additional terminal overtime for each succeeding hour. Terminal overtime to be paid at regular overtime rates.

Section 3. Time on duty will be considered as from time trainmen are ordered to leave initial terminal until relieved at destination, and when terminal overtime does not obtain, all time on duty will be computed as road time.

Article 4. Sections 1 and 2, this Article, are not to [10] apply to crews performing work, or mixed work and revenue train service of crews running between Clifton and Duncan when such service intermingle.

Section 5. Initial time is to apply on first trip out, and terminal overtime on last trip in on turn around trips where this time is allowed.

ARTICLE IV.

Section 1. The age of trainmen will date from the time of entering the service of the company as such. As vacancies occur for conductors the brakemen will be promoted according to their ability and age in the service, after having passed the necessary examination. For every two men promoted the company will have the right to appoint a third man from the ranks or elsewhere as it may elect. A conductor so appointed shall hold seniority rights as brakemen from the day he entered the service. Passenger brakemen shall have equal rights with freight brakemen and *vice versa*.

Section 2. No brakeman shall be entitled to promotion to the position of conductor unless he has had at least one year's experience in freight train service.

Section 3. Freight conductors shall be promoted to passenger conductors according to their age in the service except when a freight conductor is not qualified to satisfactorily fill the duties of the position, in which case he shall be notified of the objection in writing.

Section 4. The oldest extra freight conductors shall be given preference. Vacancies of fifteen days

or less caused by regular brakemen laying off, will be filled by extra men from the extra board when available, and not be men who are holding extra cars. The senior freight conductors and brakemen may do the extra passenger and special passenger work if they so desire.

ARTICLE V.

Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization if he so desires, and if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received if he had remained in the service. His appeal, however, must be made within sixty days and he will be given a hearing within ten days of such appeal. [11]

ARTICLE VI.

Section 1. Leave of absence will not be granted for more than ninety days except in case of sickness.

Section 2. When trainmen leave the service they will be given letter showing length of service, class of employment and cause for leaving provided they have been in the service one month or more.

ARTICLE VII.

Trainmen after continuous service of twelve hours shall have the right to take eight hours rest except in case of wrecks and washouts; provided, that no crew will be tied up for the rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after time relieved. Trainmen to be the judge as to whether they need rest or not.

ARTICLE VIII.

Section 1. During the summer season cabooses and yard crews will be furnished ice at all terminals where it can be had.

Section 2. Crews will be allowed a reasonable time in which to eat at all meal stations. At terminals where meals can be had, crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Conductors will not be required to take out inexperienced brakemen, when acceptable experienced brakemen are available. A brakeman having been objected to by two or more conductors in writing for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

Section 1. Trainmen cannot be tied up between terminals except to take rest or when they are blocked by washouts or wrecks, and when so tied up they will be allowed a minimum of ten hours' pay to, and ten hours from the tying-up point, and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up on account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest [12] unless it is apparent that the trip cannot be completed within the lawful time and not then until after the expiration of fourteen hours' duty under the Federal law, or within two hours of the time limit provided by State Laws if State Laws govern.

Section 2. Crews in work train service may be

tied up at intermediate points where provisions can be had provided that no single tie-up will be longer than twelve hours. Time to begin at the expiration of the twelfth hour.

Section 3. Clifton and Hachita are freight terminals, Clifton—only is passenger terminal.

ARTICLE XI.

Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air until such times as they can notify the proper officials.

Air hose to be coupled and uncoupled by car inspectors at all terminals where car inspectors are on duty.

ARTICLE XII.

Train crews on the main line will not be required to perform any duty except that of conductor or brakeman except in emergency cases. Trainmen will not be required to shovel down coal. Train will assist in turning engines at Clifton.

ARTICLE XIII.

Train crews will not be required to load to exceed five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

P. REISINGER,

For Arizona & New Mexico Railway.

W. C. BUELL,

J. B. KLINE,

W. E. MITCHELL,

R. M. McINTYRE,

For the B. of T.

Per W. E. MITCHELL." [13]

That last-named schedule and contract of employment is hereinafter referred to as schedule "A."

That said schedule "A" constituted and was the contract of employment between this defendant and its conductors and brakemen during the time said schedule was in force and effect.

VI.

That under the date of March 29, 1916, the Brotherhood of Railroad Trainmen, comprising the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Engineers and the Brotherhood of Trainmen, being national associations of engineers, firemen, conductors and brakemen, engaged in railway service in the United States, submitted to the railway employers of the United States, the following schedule of demands to govern between the railway employers of the United States and their trainmen.

"Article 1. (a) In all road service 100 miles or less, 8 hours or less will constitute a day, except in passenger service. Miles in excess of 100 will be paid for at the same rate per mile.

(b) On runs of 100 miles or less, overtime will begin at the expiration of 8 hours.

(c) On runs of over 100 miles overtime will begin when the time on duty exceeds the miles run divided by $12\frac{1}{2}$ miles per hour.

(d) All overtime to be computed on the minute basis and paid for at time and one-half times the *pro rata* rate.

(e) No one shall receive less than eight hours or 100 miles than they now receive for a minimum day

or 100 miles for the class of engine used or for service performed.

(f) Time will be computed continuously from time required for duty until released from duty and responsibility at end of day or run.

Article 2. (a) Eight hours or less will constitute a day in all yard and switching service. The minimum day's pay for 8-hour yards shall not be less than the present day's pay for 10-hour yards; provided that in yards having a minimum day of more than 10 hours the present day's pay as in effect January 1, 1916, will be continued with the 8-hour day.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24-hour period to be computed and paid for at the rate of time and one-half time.

(c) All overtime to be computed on the minute basis. [14]

Article 3. (a) Eight hours or less at present 10-hours' pay will constitute a day's work in hostling service.

(b) Time to be computed continuously from time required for duty until released from duty and responsibility at end of day or run. All over 8 hours within any 24 hour period to be computed and paid for at the rate of time and one-half time.

(c) All overtime to be computed on the minute basis.

Article 4. Any rates of pay, including excess mileage or arbitrary differentials that are higher, or any rules or conditions of employment contained in

individual schedules in effect January 1, 1916, that are more favorable to the employees, shall not be modified or affected by any settlement reached in connection with these proposals. The general committee representing the employees of each railroad will determine which is preferable and advise the officers of their company. Nothing in the settlement that may be reached on the above-submitted articles is to be construed to deprive the employees on any railroad from retaining their present rules and accepting any rates that may be agreed upon or retaining their present rates and accepting any rules that may be agreed upon.”

The last-named schedule and demands on the part of said Brotherhood of Trainmen is hereinafter referred to as Schedule “B.”

That the locomotive engineers, firemen, conductors and brakemen of this defendant company and plaintiff are now and at all times herein and in plaintiff’s complaint mentioned were members of said Brotherhood.

VII.

That during the month of June, 1916, at which time were then pending negotiations between the railway employees of the United States and said Brotherhoods of Trainmen, the train employees of this company presented for consideration of defendant a proposed new wage schedule upon the 8-hour and time and one-half overtime basis, among which schedules and demands was one made in behalf of conductors and brakemen of defendant company, in words and figures as follows, to wit: [15]

“SCHEDULE OF PAY AND REGULATIONS
FOR CONDUCTORS AND BRAKEMEN ON
ARIZONA & NEW MEXICO RAILWAY
COMPANY.

The following rates of pay and regulations will govern the employment and compensation of conductors and brakemen in the service of the Arizona & New Mexico Railway Company, and will be in effect from

No revision or abrogation of this contract or agreement will be made without at least thirty (30) days' notice in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

Section 1. Rates of pay in passenger service will be:

Conductors \$182.00 per calendar month.

Brakemen \$117.00 “ “ “

Eight hours to constitute a day. Overtime $1\frac{1}{2}$ times *pro rata* rate. One crew to be paid for the calendar days provided they lose no time on their own account. Extra service to be paid for proportionately.

Rates of pay in freight work and mixed service will be:

Conductors, \$140.00 per month.

Brakemen, 107.00 per month.

Twenty-six (26) days to constitute a month's work. Eight hours (8) to constitute a day. Overtime after eight hours at $1\frac{1}{2}$ the *pro rata* rate.

The senior crew to be paid for twenty-six (26) days each month. (Overtime not to apply as part

of the month's work.) Extra crews to be paid proportionately for amount and class of service performed.

ARTICLE II.

Section 1. In all branches of the service overtime will be computed at $1\frac{1}{2}$ times the *pro rata* rate. Actual time to be counted.

Section 2. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

Section 3. Trainmen run from terminal to terminal, or a lesser distance with an extra or special passenger or mixed train and doubling back with freight train, or *vice versa*, will be paid one passenger day and overtime for the special and in addition one freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence 30 minutes after arrival at turning point unless leaving time is earlier.

Section 4. When necessary to run pilots, trainmen shall be employed as such and will receive freight conductors' pay.

Section 5. Trainmen deadheading at the request of the company [16] will be paid full time at the regular rate applicable to the service in which they are regularly employed. When changed off between terminals from one crew to another at Company's convenience shall be paid not less than two days' overtime, if same is obtained.

Section 6. Trainmen on court duty for the Company will be paid for full time lost, and will be allowed their necessary expenses while away from home, same to be certified to by the Attorney for the Company. Trainmen shall receive not less than one day's pay and the necessary expenses for each twenty-four (24) hours serving on court duty.

Section 7. Trainmen who are called and whose services are not wanted, and are held on duty four hours or less, shall be paid one-half day's pay. If held on duty more than four hours and not over eight hours, they shall receive one day's pay. If held over eight hours, they will be paid therefor at regular overtime rates.

Section 8. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness shall be paid one day's pay and overtime if same is earned by other members of the crew.

Section 9. When time slips turned in by trainmen are not allowed they shall be so notified and same immediately returned for correction, and full explanation will be given why same are not allowed.

Section 10. When crews are required to accompany specials or for any other purpose leave the home line or divisions in charge of, or with a train, they shall receive actual time made as per Article I, Section 1, and the sum of \$2.50 per day for expenses.

Section 11. Trainmen required to go to the S. P. or E. P. & S. W. yard to receive or deliver cars shall

be paid not less than three hours and overtime, if overtime is obtained. Time for making such trips not to be deducted from road day.

ARTICLE III.

Section 1. Time of trainmen to begin at time required to report for duty until relieved at destination. Time to be allowed date train leaves terminal. If held in yard for any cause, they will be allowed actual minutes, initial overtime, to be figured at overtime rates. Road crews will not be required to do any switching in Clifton yards, and if required to do so, they will be allowed one day's pay and overtime, if overtime is obtained in addition to their road time. This is not to apply to switching explosives to transfer, or setting out bad order cars.

Section 2. Initial overtime is to apply on first trip out, and terminal overtime *one* last trip in.

ARTICLE IV.

Section 1. The age of trainmen will date from the time of entering service of the Company as such. As vacancies occur for conductors, brakemen will be promoted according to their ability and age in the service after having passed the necessary examinations. Passenger men shall have equal rights with freight rates and *vice versa*.

Section 2. No brakeman shall be entitled to promotion to the position of conductor, unless he has had at least one year's experience in freight train service.

Section 3. Freight conductors shall be promoted to passenger conductors according to their age in the service, except when a freight conductor is not quali-

fied to satisfactorily fill the [17] duties of the position, in which case he shall be notified of objection in writing.

Section 4. The oldest extra freight conductor shall be given preference. Vacancies of fifteen days or less, caused by regular brakemen laying off will be filled by extra man from the extra board when available, and not by men who are holding extra cars. The senior freight conductor and the brakeman may do the extra passenger and special passenger work, if they so desire.

ARTICLE V.

Section 1. Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization, if he so desires, and if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received, if he had remained in the service. His appeal, however, must be made within sixty days, and he will be given a hearing within ten days of such appeal.

ARTICLE VI.

Section 1. Leave of absence will not be granted for more than ninety days, except in case of sickness, provided that after three years' continuous service trainmen will be entitled to one year leave of absence, if they so desire.

Section 2. When trainmen leave the service they will be given letters showing length of service, class of employment, and cause for leaving, provided they have been in the service thirty days or more.

ARTICLE VII.

Section 1. Trainmen after continuous service twelve hours or more shall have the right to take eight hours' rest, except in case of wrecks or wash-outs, provided that no crew will be tied up for rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after time released. Trainmen to be the judge as to whether they need the rest or not. When tied up at Hachita twenty hours, or longer, they shall receive eight hours' pay.

ARTICLE VIII.

Section 1. During the summer season caboose and yard crews will be furnished ice at all terminals where it can be had.

Section 2. Crews will be allowed a reasonable time to eat at any stations where meals can be had. At terminals where meals can be had crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Section 1. Conductors will not be required to take out inexperienced brakemen, when acceptable experienced brakemen are available. A brakeman, having been objected to by two or more conductors in writing, for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

Section 1. Trainmen cannot be tied up between terminals except to take rest, or when they are blocked by washouts or wrecks, and when so tied up they will be allowed a minimum of eight hours'

pay to and eight hours' pay from the tying up point, and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up on account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest unless it is apparent that trip cannot be completed within the lawful time and not then until after the expiration of fourteen hours' duty, under the federal law, or within two hours of the time [18] limit provided by state laws, if state laws govern.

Section 2. Crews in work train service may be tied up at intermediate points where provisions can be had, provided that no single tie-up will be longer than twelve hours. Time to begin at the expiration of the twelfth hour.

Section 3. Clifton and Hachita are freight terminals. Clifton only is passenger terminal.

ARTICLE XI.

Section 1. Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air, until such times as they can notify the proper officials. Air hose are to be coupled and uncoupled by car inspectors at all stations where car inspectors are on duty.

ARTICLE XII.

Section 1. Train crews shall not be required to perform any duty except that of conductor or brakeman, except in emergency cases. Trainmen will not be required to shovel down coal, or oil engines.

ARTICLE XIII.

Section 1. Train crews will not be required to

load to exceed five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

ARTICLE XIV.

Section 1. Trainmen shall hold jobs to which their seniority entitled them, if they so desire.

ARTICLE XV.

Section 1. In the running of double-headers thirty cars will be the maximum number of cars per train, exclusive of water car and caboose.

Signed:

_____,
For the Arizona & New Mexico Railway Company.

_____,
Committee of Brotherhood of Railway Trainmen.”

That last-named proposed schedule is hereinafter referred to as Schedule “C.” [19]

VIII.

That this defendant and its railway employees and in particular its conductors and brakemen were not desirous of entering into the national controversy then in progress between said National Brotherhoods of Trainmen and said Railway employers of the United States as aforesaid, and to that end and for the purpose of compromising and settling the demands of defendant’s employees, and in particular of its conductors and brakemen, pending the settlement of said controversy between said National Brotherhoods of Trainmen and said Railway employers of the United States, entered into

and adopted certain schedules and contracts of employment to govern between the employees of this defendant and this defendant, among which was that certain schedule and contract of employment between this defendant and its conductors and brakemen, in words and figures as follows, to wit:

“SCHEDULE OF PAY AND REGULATIONS
FOR CONDUCTORS AND BRAKEMEN OF
THE ARIZONA AND NEW MEXICO RAIL-
WAY.

The following rates of pay and regulations will govern the employment and compensation of Conductors and Brakemen in the service of THE ARIZONA AND NEW MEXICO RAILWAY COMPANY and will be in effect from June 16th, 1916.

No revision or abrogation of this contract or agreement will be made without at least thirty days' notice in writing. All rates of pay, rules and regulations previously in effect are null and void.

ARTICLE I.

1. Rates of pay in passenger service will be:

Conductors \$210.00 per calendar month.

Brakemen \$150.00 per calendar month.

Ten hours or less to constitute a day. Overtime *pro rata*.

2. Rates of pay in freight work or mixed service will be:

Conductors \$169.00 per month.

Brakemen \$136.50 per month.

Twenty-six days to constitute a month's work. Ten hours [20] or less to constitute a day. Overtime after ten hours *pro rata*.

ARTICLE II.

1. When road crews are required to make one or more trips to 85 Mine, one hour overtime will be allowed for time consumed up to one hour. If the service consumes over one hour, overtime will be paid for such service on a minute basis.

2. In all classes of service when road crews are required to make up trains at Hachita, for time consumed up to one hour, one hour initial terminal overtime will be allowed. Time consumed over one hour will be paid for as initial overtime on a minute basis.

3. It is understood that time allowed for 85 Spur and terminal or initial overtime is not to be deducted from time on duty.

4. When the business of the Arizona and New Mexico Railway per month amounts to 30,000 tons revenue freight hauled, three crews will be considered regular and will be guaranteed twenty-six days per month overtime not to be counted in guarantee. The company reserves the right to reduce the number of crews at any time when there is not enough business to justify the foregoing guarantee.

5. In all branches of the service, overtime will be computed *pro rata*, actual minutes to be counted.

6. Trainmen making extra trips in addition to their regular runs shall be paid extra therefor at the regular rate for the class of service performed.

7. Trainmen run from terminal to terminal or a lesser distance with an extra or special passenger or mixed train and doubling back with freight train or *vice versa*, will be paid one passenger day

and overtime for the special and in addition one freight day and overtime for the freight service. When freight cars are not handled either way, passenger pay will govern. When freight cars are handled, time for return trip is to commence thirty minutes after arrival at turning point unless leaving time is earlier.

8. When a freight train makes a Lordsburg turn, trainmen will not be required to make more than one trip up the hill [21] south of Clifton or north of Guthrie, unless in case of urgent necessity, and, in the event that more than one trip will have to be made, constructive overtime will be allowed for each extra trip. On through trips from terminal to terminal, trainmen will not be required to double hill south of Clifton or to make more trips than a double north of Guthrie.

9. When necessary to run pilots, trainmen shall be employed as such and will receive freight conductor's pay.

10. Trainmen deadheading at the request of the company will be paid one day at the regular rate applicable to the service in which they are regularly employed. When changed off between terminals, from one crew to another at the company's convenience, they shall be paid not less than two days and overtime if same is obtained.

11. Trainmen on court duty for the company will be paid for full time lost, and will be allowed their necessary expenses while away from home, same to be certified by the attorney for the company. Trainmen will receive not less than one day's pay

and the necessary expenses for each twenty-four hours serving on court duty.

12. Trainmen who are called and whose services are not wanted, and are held on duty five hours or less, shall be paid one-half day's pay. If held on duty more than five hours and not over ten hours, they shall receive one day's pay. If held over ten hours, they will be paid therefor at regular overtime rates.

13. Trainmen retired from service on account of insubordination or sickness will be paid for the actual time worked. Trainmen called to relieve those retired on account of insubordination or sickness will be paid one day's pay and overtime if same is earned by other members of the crew.

14. When time slips turned in by the trainmen are not allowed, they shall be so notified and same immediately returned for correction. Full explanation will be given why same are not allowed.

15. When crews are required to accompany specials or for any other purpose leave the home line or division in charge of, or with, a train, they shall receive actual time made as [22] per Article I, paragraph 1, and the sum of \$2.50 per day for expenses.

16. Trainmen will not be required to go to the Southern Pacific or El Paso and Southwestern yards to receive or deliver cars except for perishable freight or live stock.

ARTICLE III.

1. Time of trainmen is to begin at time required to report for duty and will end when relieved at destination. Time to be allowed date trains leave ter-

minal. If freight crews are held in yard after time set to depart for any cause, they will be allowed actual minutes initial overtime, to be figured at overtime rates. Road crews will not be required to do any switching in Clifton Yard. This is not to apply to switching explosives to transfer, or setting out bad order cars not to tramp crews.

2. Initial overtime is to apply to first trip out and terminal overtime to last trip in.

ARTICLE IV.

1. The age of trainmen will date from the time of entering service of the company as such. As vacancies occur for conductors, brakemen will be promoted according to their ability, and age in the service, after having passed the necessary examination. Passenger men shall have equal rights with freight men and *vice versa*.

2. No brakeman shall be entitled to promotion to the position of conductor unless he has had at least one year's experience in freight train service.

3. Freight conductors shall be promoted to passenger conductors according to their age in the service, except when a freight conductor is not satisfactorily qualified to fill the duties of the position, in which case he shall be notified of objection in writing.

4. The oldest extra freight conductor shall be given preference. Vacancies of fifteen days or less caused by regular brakemen laying off will be filled by extra men from the extra board when available, and not by men who are holding extra cards. The senior freight conductor and brakemen may do the

extra passenger and special passenger work, if they so desire. [23]

ARTICLE V.

Any trainman deeming he is unjustly dealt with shall have the right to a full investigation and be represented by his organization, if he so desires, and, if it is decided that he has been wrongfully disciplined, he will be reinstated and paid not less than he would have received if he had remained in the service. His request for an investigation, however, must be made within sixty days, and he will be given a hearing within ten days of such request.

ARTICLE VI.

1. Leave of absence will not be granted for more than ninety days, except in cases of sickness; provided, that after three years' continuous service, trainmen will be entitled to one year's leave of absence, if they so desire.

2. When trainmen leave the service, they will be given letters showing length of service, class of employment and cause for leaving, provided they have been in the service thirty days or more.

ARTICLE VII.

Trainmen, after continuous service of twelve hours or more, shall have the right to take eight hours' rest, except in case of wrecks, or washouts; provided, that no crew shall be tied up for rest except at terminals or to conform with the provisions of the law. The time for rest shall commence one hour and thirty minutes after the time released. Trainmen to be the judges as to whether they need the rest or not. When tied up at Hachita twenty

hours or longer, they shall receive ten hours pay for each twenty-four hours so held.

ARTICLE VIII.

1. During the summer season cabooses and yard crews will be furnished ice at all terminals where it can be had.

2. Crews will be allowed a reasonable time to eat at any station where meals can be had. With the exception of Hachita, at terminals where meals can be had, crews are required to be with trains thirty minutes before leaving time.

ARTICLE IX.

Conductors will not be required to take out inexperienced brakemen when acceptable experienced brakemen are available. [24] A brakeman, having been objected to by two or more conductors in writing, for good and sufficient reasons, will be dismissed from the service.

ARTICLE X.

1. Trainmen cannot be tied up between terminals except to take rest, or when they are blocked by washouts and wrecks, and when so tied up, they will be allowed a minimum of ten hours' pay to and ten hours' pay from tying up point; and in addition thereto, twelve hours' pay for each twenty-four hours so held. Time for crews tied up account of the law is to begin at the end of the legal rest period. Crews in road service will not be tied up for rest unless it is apparent that trip cannot be completed within the lawful time and then not until after the expiration of fourteen hours' duty under the Federal Law, or within two hours of the time limit

provided by State Laws, if State Laws govern.

2. Crews in work train service may be tied up at intermediate points where provisions can be had, provided that no single tie-up will be longer than fourteen hours. Time to begin at the expiration of the fourteenth hour.

3. Clifton and Hachita are freight terminals. Clifton only is passenger terminal.

ARTICLE XI.

All freight train crews will consist of a conductor and three brakemen. Brakemen will not be required to go out on runs with less than full crews. Conductors will be held responsible for handling trains without air until such times as they can notify the proper officials. Air hose to be coupled and uncoupled by car inspectors at all stations where car inspectors are on duty.

ARTICLE XII.

Train crews shall not be required to perform any duty except that of conductors and brakemen, except in emergency cases. Trainmen will not be required to shovel down coal or oil engines.

ARTICLE XIII.

Train crews will not be required to load to exceed [25] five thousand pounds of freight at any one station, nor will they be required to unload to exceed five thousand pounds out of any one car at any one place.

ARTICLE XIV.

Trainmen shall hold jobs to which their seniority entitles them, if they so desire.

ARTICLE XV.

In the running of double-headers, thirty cars will be the maximum number of cars per train, exclusive of water cars and cabooses.

Signed:

P. REISINGER,

For the A. & N. M. Ry. Co.,

J. M. KLINE,

W. E. MITCHELL,

I. C. CONNER,

For the B. of R. T.

Approved:

NORMAN CARMICHAEL,

General Manager."

The last-named schedule and contract of employment is hereinafter referred to as Schedule "D."

IX.

That at the time of the formation and adoption of said Schedule "D," effective June 16, 1916, it was appreciated by this company and its trainmen that the question of the national adoption on the part of the railroad brotherhoods of trainmen and the railway employees of the United States of an 8-hour day and time and one-half overtime basis for wages, was not settled, and that the matter was then an open question likely to be determined either by adoption or by rejection or by compromise and that inasmuch as the trainmen and employees of this defendant company, are and then were members of and affiliated with said National Brotherhood of Trainmen, in the event the 8-hour day and time and one-half overtime basis of wage schedule was either

adopted or a compromise effected thereon, a further adjustment of wages would be necessary between this defendant and its trainmen upon said schedule "D," in conformity with the conclusion and agreement if reached between the said National Brotherhoods of Trainmen and said railway [26] employers of the United States. Recognizing this contingency an express written agreement was executed between this company and its trainmen, in words and figures as follows, to wit:

“AGREEMENT BETWEEN THE TRAIN AND
ENGINE MEN OF THE ARIZONA AND
NEW MEXICO RAILWAY COMPANY
AND THE ENGINE MEN OF THE CORO-
NADO RAILROAD.

In signing up the agreement between the Train and Engine men which is effective under date of June 16, 1916, it is mutually agreed between the parties to this agreement namely: The Arizona & New Mexico Railway Company, The Coronado Railroad, the Engine men of the Coronado Railroad and the Train and Engine Employees of The Arizona & New Mexico Railway, that in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new Schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time and one-half for overtime, this schedule of

June 16th, 1916, will not be considered as having been in effect.

(Signed) THEO. M. KLINE,
For the Engineers.

(Signed) FRANK THOMAS,
For the Firemen.

(Signed) W. E. MITCHELL,
For the Trainmen.

(Signed) P. REISINGER,
For the Arizona and New Mexico Ry. and the Coronado Railroad.

Clifton, Arizona, July 7th, Nineteen Sixteen."

That the last-mentioned agreement is hereinafter referred to as schedule "E." [27]

XI.

That the agreement between the train and engine men effective under date of June 16, 1916, mentioned and referred to in said schedule "E" is the agreement set forth and contained in said schedule "D."

XII.

That the aforesaid agreements, excepting in so far as one may be affected by the others, were in full force and effect at the time the Adamson Act became effective.

XIII.

That plaintiff entered the employ of this defendant as trainman and brakeman on the 6th day of August, 1916, and continued in such employment to and until the 27th day of April, 1917.

XIV.

That from said 6th day of August, 1916, to and including the 31st day of December, 1916, plaintiff

was paid and receipted in full for all services by him performed as such trainman and brakeman for defendant as provided by and under the provisions of said schedule "D."

XIV.

That subsequent to the passage of the Adamson Act the train employees of defendant, including plaintiff, insisted on schedule "D" being so changed as to apply to such schedule the eight-hour provisions of such Adamson Act, and that they be paid by such schedule "D" on an eight-hour basis, with overtime in excess of eight hours at the same rate, but that defendant declined so to do and thereafter paid such employees, including plaintiff, for such train service compensation computed on the basis of an application of the Adamson Act and its provisions to the compensation provided in schedule "A" except in cases where by using the provisions of schedule "D" without applying the Adamson Act, a greater compensation would result to such employees, including plaintiff, in which cases such compensation was computed and payments made in accordance with schedule "D," without applying the Adamson Act to plaintiff and other train employees.
[28]

XVI.

That from and including the first day of January, 1917, to and including the said 27th day of April, 1917, plaintiff performed the services and worked the number of hours and was paid therefor by, and received and accepted from, defendant, as follows:

Date.	Actual Hours Worked.		Extras Under Schedule "D."		Total Time Paid.		Hourly Rate.	Paid Per Day.
1917.	Hrs. & Minutes.		Hrs. & Minutes.		Hrs. & Mts.		Cents.	\$
1917.								
Mar.								
1	10		1		11		52½	5.78
2	9	10	2		12		"	6.30
3								
4	12	25	1		13	25	"	7.04
5	10	06		54	11		"	5.78
6	9	10	1		11		"	5.77
7	8		1		11		"	5.78
8	9	30	1		11		"	5.77
9	8		1		11		"	5.78
10	10 Pas-40				10	40	50	5.33
11	10	sen-27	1		11	27	52½	6.01
12	9	ger 35	1		11		"	5.78
13	11	25	1		12	25	"	6.52
14	8		1		11		"	5.78
15	9	35	1		11		"	5.78
								<hr/> \$83.20
16	8	47	1		11		"	5.77
17	11	15	1		12	15	"	6.43
18	10	50		10	11		"	5.78
19	8 Passenger				10		50	5.00
20								
21	10	28	1	32	12		52½	6.30
22	11	15	1		12	15	"	6.43
23	9	35	1		11		"	5.77
24								
25	(9		1		11		"	5.78
	(8				10		"	5.25
26	8		1		11		"	5.77
27	12	15	1		13	15	"	6.96
28	8		1		11		"	5.77
29	9	40	1		11		"	5.77
30	9	34	1		11		"	5.77
								<hr/> \$82.55

Date.	Actual Hours Worked.		Extras Under Schedule "D."		Total Time Paid.		Hourly Rate.	Paid Per Day.
1917.	Hrs. & Minutes.		Hrs. & Minutes.		Hrs. & Mts.		Cents.	\$
1	9	35	1	5	11	5	52½	5.82
2	10	51		9	11		"	5.78
3	9	55	1		11		"	5.78
4	8	31	1		11		"	5.78
5	9	15	1		11		"	5.78
6	8		1		11		"	5.78
7								
8	9	35	1		11		"	5.77
9	9	37	1		11		"	5.78
10	8	35			10		"	5.25
11	8	50	1		11		"	5.77
12	8				10		"	5.25
13	8		1		11		"	5.78
14								
15	11	53	1	02	12	55	"	6.78
								\$75.10
16	8	57	1		11		"	5.78
17	10	20	1		11	20	"	5.95
18	8	40	1		11		"	5.77
19	10	15	1		11	15	"	5.91
20	8		1		11		"	5.78
21								
22	10	20	1		11	20	"	5.95
23	9	35	1		11		"	5.78
24	9	55	1	20	11	20	"	5.95
25	8		1		11		"	5.78
26	12		1		13		"	6.83
27	9	25	1		11		"	5.77
								Grand Total.....\$645.75

RECAPITULATION OF ABOVE STATEMENT:

Earned and paid under Schedule "A" with Adamson Act applied thereto:	
As Freight Brakeman 1075-36/60 hrs. at 52½¢ per hr.....	\$564.72
As Passenger Brakeman 18-40/60 hrs. at 47.175¢ per hr.....	8.80
	<hr/>
Total	\$573.52
Paid in addition under Schedule "D" as provided in paragraph 15 herein the sum of.....	
	72.23
	<hr/>
Grand Total.....	\$645.75

[32]

XVII.

That if under the facts above stated, it was the duty of defendant to pay plaintiff under schedule "A" with Adamson Act applied thereto, defendant would have earned and have been entitled to receive for such services as follows:

As Freight Brakeman 1075-35/60 hrs. at 52½¢ per hr.....	\$564.72
As Passenger Brakeman 18-40/60 hrs. at 47.175 per hr.....	8.80
	<hr/>
Total	\$573.52

XVIII.

That if under the facts above stated it was the duty of defendant to pay plaintiff under schedule "D," with Adamson Act applied thereto, plaintiff

would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1075-36/60 hrs. at 65.625¢ per hr.....	\$705.85
As Passenger Brakeman 18-40/60 hrs. at 62.5 per hr.....	11.67
	<hr/>
Total	\$717.52

XIX.

That if under the facts above stated it was the duty of defendant to pay plaintiff under schedule "D," plaintiff would have earned and would have been entitled to receive for such services as follows:

As Freight Brakeman 1210-12/60 hrs. at 52.5¢ per hr.....	\$635.40
As Pass'gr Brakeman 20-40/60 hrs. at 50 cents per hr.....	10.35
	<hr/>
Total.....	\$645.75

Respectfully submitted,

L. KEARNEY,

Attorney for Plaintiff.

H. A. ELLIOTT,

Attorney for Defendant. [33]

[Endorsed]: In the United States District Court in and for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Agreed Statement of Facts. Filed this 6th day of February, 1920. C. R. McFall, Clerk. L. Kearney, Attorney for Plaintiff, Clifton, Arizona. H. A. Elliott, Attorney for Defendant, Clifton, Arizona. [34]

In the District Court of the United States for the
District of Arizona.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Judgment.

This action came on regularly for trial on the 21st day of February, 1920, the plaintiff being represented by his attorney, L. Kearney, Esq., and the defendant being represented by its attorney, H. A. Elliott, Esq., said matter was argued and submitted to the Court sitting without a jury, a jury having been waived in the premises, and the Court being now fully advised in the premises renders judgment for the plaintiff and against the defendant in accordance with the prayer of said complaint.

Now, therefore, by reason of the law and the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED, that the plaintiff, H. E. Foley, do have and recover of and from the defendant, The Arizona & New Mexico Railway Company, a corporation, the sum of One Hundred Fifty and no/100 Dollars (150.00), with interest thereon at the rate of six per centum per annum until paid; together with the plaintiff's costs and disbursements incurred in this action; amounting to the sum of Thirty and no/100 Dollars (30.00) with like

6% interest thereon, until paid, and for the collection of this judgment let execution issue.

Judgment rendered and entered, July 6, 1920.

[Endorsed]: Judgment. Filed July 22, 1920.
C. R. McFall, Clerk. [35]

In the United States District Court in and for the
District of Arizona.

L.-110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Opinion.

L. KEARNEY, for Plaintiff,

H. A. ELLIOTT, for Defendant.

FARRINGTON, District Judge (Specially Assigned):

The defendant is an Arizona corporation engaged in operating a railroad one hundred and eleven miles in length, running from Clifton, Arizona, to Lordsburg, New Mexico. Plaintiff was a brakeman in its employ from August 6, 1916, to April 27, 1917, and during all that time was a member of the Brotherhood of Railroad Trainmen. When he entered the service of the company he

worked under a schedule and contract of employment which became effective June, 1916, and continued to be so until January of the following year. During and prior to this time negotiations were pending between the railroad employers of the United States and the National Brotherhoods of Trainmen, which finally culminated in what is popularly known as the Adamson Act. Pending this controversy, in order to avoid entering into it, and for the purpose of temporarily adjusting wage difficulties, defendant and its employees entered into a schedule and contract of employment, herein designated as Exhibit "D," which, among other things, provided:

"1. Rates of pay in passenger service will be:

Conductors \$210.00 per calendar month.

Brakemen \$150.00 per calendar month.

Ten hours or less to constitute a day. [36]

Overtime *per rata*.

2. Rates of pay in freight work or mixed service will be:

Conductors \$169.00 per month.

Brakemen \$136.50 per month.

Twenty-six days to constitute a month's work.

Ten hours or less to constitute a day. Over-

time after ten hours *pro rata*."

Appreciating the fact that the controversy between the Railroad Brotherhoods and the railway employers of the United States related to the national adoption of an eight-hour day, and time and one-half overtime basis for wages, and that in the event of the adoption of such a schedule, a further

adjustment of wages would be necessary, the defendant company and its employees entered into a written agreement, dated July 17, 1916, which is designated Schedule "E," and in part is as follows:

"That in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new schedule under date of June 16th, 1916, will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time and one-half for overtime, this schedule of June 16th, 1916, will not be considered as having been in effect."

Subsequent to the passage of the Adamson Act the train employees of defendant, including plaintiff, insisted on Schedule "D" being so changed as to apply to such schedule the eight-hour provisions of the Adamson Act, and that they be paid by such Schedule "D" on an eight-hour basis, with overtime in excess of eight hours at the same rate, but that defendant declined so to do, and thereafter paid such employees, including plaintiff, for such train service compensation computed on the basis of an application of the Adamson Act and its provisions to the compensation provided in a schedule of wages designated as Schedule "A," which was in force and effect between April 11, 1911, and June 7, 1916.

From January 1st, 1917, to and including April 27th, 1917, Foley earned and was paid under sched-

ule "A" with the [37] Adamson Act applied thereto.

As Freight Brakeman, 1075-35/60 hrs. at 52½¢ per hr.....	\$564.72
As Passenger Brakeman 18-40/60 hrs. at 47.175¢ per hr.....	8.80
	<hr/>
Total	\$573.52

Paid in addition under schedule "D" as provided in paragraph 15 herein the sum of\$ 72.23

Grand Total.....\$645.75

Under schedule "D," without applying the Adamson Act, Foley would have earned and would have been entitled to receive for the same service:

As Freight Brakeman 1210-12/60 hrs. at 52.5¢ per hr.....	\$635.40
As Passenger Brakeman 20-40/60 hrs. at 50 cents per hr.....	10.35
	<hr/>
Total	\$645.75

Plaintiff contends that it was defendant's duty to pay him under schedule "D" with the Adamson Act applied, wages as follows:

As Freight Brakeman 1075-35/60 hrs. at 65.625¢ per hr.....	\$705.85
As Pass'gr Brakeman 18-40/60 hrs. at 62.5¢ per hr.....	11.67
	<hr/>
Total	\$717.52

The Adamson Act (39 St. at L., p. 721) establishes an eight-hour day standard for work and wages for certain employers or carriers engaged in interstate commerce on railroads exceeding one hundred miles in length; and it further provides:

“Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day’s wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the prorated for such standard eight-hour workday.”

Section 2 of the same statute provides for the appointment of a commission, and requires it to report its findings as to the operation and effect of the eight-hour standard workday for a period of not less than six months. Consequently, under the statute there would be no reduction of wages below the then standard for at least seven months after January 1st, 1917. The wages in dispute are claimed for services rendered [38] between January 1, 1917, and April 27th, of the same year.

The Adamson Act was approved September 3d and 5th, 1916. By its express terms it was made effective on and after January 1, 1917. Questions as to its constitutionality were settled by the Supreme Court in *Wilson vs. New*, 243 U. S. 332. The Court went upon the theory that inasmuch as the carriers and their employees could not agree upon a standard of wages, and the failure to agree was

liable to result in the entire interruption of interstate commerce to the infinite detriment of the public, it was competent for Congress under its power to regulate commerce between the States to provide by appropriate action for a standard of wages. The same decision forecloses any question here as to the power of Congress at the time of the passage of the Act to prescribe a minimum standard of wages "obligatory on both parties to be in force for a reasonable time in order that an opportunity might be afforded the contracting parties to agree upon and substitute a standard of their own."

The Act fixes eight hours as the standard work-day and the measure of a day's work for the purpose of reckoning the compensation of employees engaged in operating trains of interstate carriers. There was no pretense of restricting the service to eight hours in each twenty-four. It also directs that during a minimum period of seven months after January 1st, 1917, the wages of employees for an eight-hour workday shall not be reduced below the then present standard day's wages. In other words, that for seven months at least after said date such employees must be paid for an eight-hour day as much as they were then receiving for a ten-hour day. In express terms the Act was made applicable to all employees of a certain class, which included this plaintiff. No exception was attempted to be made as to any member of the class, or as to any schedule of wages which might have been established by agreement of the parties.

At the time plaintiff entered defendant's employ,

at the time the Adamson Act was passed, and at the time it became [39] effective, Schedule "D" was in force, and it was the only schedule then effective. It was the present standard day's wage within the meaning of that term as it is used in section 3 of the act. Schedule "A" had been abandoned in June, 1916, by agreement of the parties. Schedule "D" was the only schedule or standard of wages to which, under its express terms, the Adamson Act could apply. If the Adamson Act cannot be applied to Schedule "D," it is ineffective so far as the parties to this litigation and the employees of the defendant corporation are concerned.

Conceding to Schedule "E" the full force and effect of an agreement between the immediate parties to this action, the fact still remains that Congress may pass laws impairing the obligation of contracts.

12 Corpus Juris, 987;

United States vs. United Shoe Machinery Co., 234 Fed. 127, 151;

Watson vs. St. Louis I. M. & S. Ry. Co., 169 Fed. 942, 946;

Pinney & Boyle Co. vs. Los Angeles Gas & Elec. Corp., 141 Pac. 620;

1915C, L. R. A. (N. S.) 282.

If this were not so, individuals and corporations could by contracts between themselves anticipate and defeat the effect of acts passed by Congress in the exercise of its undisputed authority to regulate interstate commerce.

Louisville & Nashville R. R. vs. Mottley, 219
U. S. 467, 484;

Portland Ry. L. & P. Co. vs. R. R. Com., 105
Pac. 709; 109 Pac. 273;

Pinney & Boyle Co. vs. Los Angeles Gas &
Elec. Corp., 1915C, L. R. A. (N. S.) 282,
and note.

In *Louisville & Nashville R. R. vs. Mottley*,
supra, the Court quotes with approval the follow-
ing language of Judge Cooley:

“If the legislature had no power to alter its
police laws when contracts would be affected,
then the most important and valuable reforms
might be precluded by the simple device of en-
tering into contracts for the purpose. No doc-
trine to that [40] effect would be even
plausible, much less sound and tenable.”

In the legal tender cases, 12 Wall. 457, 551, Mr.
Justice Stone says:

“As in a state of civil society property of a
citizen or subject is ownership, subject to the
lawful demands of the sovereign, so contracts
must be understood as made in reference to the
possible exercise of the rightful authority of
the government, and no obligation of a con-
tract can extend to the defeat of legitimate
government authority.”

It must be presumed that Schedule “E” was ex-
ecuted with full knowledge and understanding that
Congress might exercise, as in the *Adamson* case,
its authority to establish an eight-hour day for
trainmen in interstate commerce, and also to pre-

scribe a minimum wage. I must therefore hold that plaintiff is justified in claiming that his wages should be fixed by application of the provisions of the Adamson Act to Schedule "D."

Let a judgment be entered in favor of the plaintiff in accordance with the prayer of the complaint.
[41]

[Endorsed]: In the United States District Court, in and for the District of Arizona. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Opinion. Filed July 7, 1920. C. R. McFall, Clerk.
[42]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,
Defendant.

Petition for Writ of Error (Copy).

To the Honorable WM. H. SAWTELLE, Judge of the District Court Aforesaid:

Now comes The Arizona and New Mexico Railway Company, a corporation, the defendant above named, by its attorney, and respectfully shows that

on the 6th day of July, 1920, the Court directed, and there was entered an order directing judgment to be entered in favor of plaintiff above named and against defendant above named, in accordance with the prayer of plaintiff's complaint, and that on the 22d day of July, 1920, pursuant to said order, a final judgment was entered against your petitioner, the defendant above named, and in favor of plaintiff above named, in the sum of One Hundred and Fifty (\$150.00) Dollars, with interest at the rate of six per cent (6%) per annum until paid, together with plaintiff's costs and disbursements in the sum of Thirty (\$30) Dollars, with like interest thereon until paid.

Your petitioner, feeling itself aggrieved by the said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf [43] to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of

said writ of error by the Circuit Court of Appeals.

H. A. ELLIOTT and
ERNEST W. LEWIS,
Attorneys for Petitioner in Error. [44]

In the United States District Court, in and for the
District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Assignment of Errors (Copy).

Comes now The Arizona and New Mexico Rail-
way Company, a corporation, by its attorneys and
says:

That in the record and proceedings herein in the
United States District Court for the District of
Arizona, there is manifest error to the great preju-
dice of The Arizona and New Mexico Railway
Company, a corporation, in this, to wit:

I.

That the trial court erred in rendering and enter-
ing judgment in favor of the plaintiff and against
the defendant in the sum of One Hundred Fifty
(150) Dollars, said sum being in excess of the sum
of Seventy-one 20/100 (\$71.20/100) Dollars, the

amount specified in the agreed statement of facts as the amount to which the plaintiff was entitled in the event judgment should be granted in his favor.

II.

That the trial court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [45] set forth in the agreed statement of facts, by its very terms was not an agreement in force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts.

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D" to which the trial court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad

Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant for the reason that the defendant in paying its employees, and particularly plaintiff, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D," with the Adamson Act applied thereto, as was determined by the trial court to be its duty to do, did not thereby reduce the compensation of plaintiff below the standard day's wage in effect either at the passage of the Adamson Act or its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

IV.

That the Court erred in rendering judgment in [46] favor of the plaintiff and against the defendant for the reason that the Adamson Act contemplates the enforcement of its provisions by penalty and affords no civil right of action to the employee for failure to comply therewith.

WHEREFORE, by reason of the errors aforesaid The Arizona and New Mexico Railway Company prays that the judgment rendered and entered in this action be voided, annulled and reversed and that said District Court of the United

States for the District of Arizona be directed to grant a new trial of said cause.

H. A. ELLIOTT,
ERNEST W. LEWIS,
Attorneys for Defendant. [47]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Petition and Assignment of Errors. Filed January 22, 1921. C. R. McFall, Clerk. [48]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of H. A. Elliott and Ernest W. Lewis, attorneys for defendant, and upon filing a petition for a writ of error and assignment of errors,—

IT IS ORDERED that a writ of error be, and hereby is, allowed to have reviewed in the United

States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, upon said defendant filing herein a bond in the sum of Five Hundred (\$500.00) Dollars conditioned that if the said defendant shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good then the obligation thereof to be void; else to remain in full force and virtue.

Dated this 22d day of January, A. D. 1921.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Order Allowing Writ and Fixing Bond. Filed January 22, 1921. C. R. McFall, Clerk. [49]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Chas. F. Solomon and H. H. Holbert, as sureties, are held and firmly bound unto H. E. Foley, the plaintiff above named, in the full and

just sum of Five Hundred (\$500.00) Dollars, to be paid to the said H. E. Foley, his attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the 22d day of January, A. D. 1921.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Arizona, sitting at Tucson in said District in a suit pending in said court between the said H. E. Foley as plaintiff, and The Arizona and New Mexico Railway Company, a corporation, as defendant, Cause No. 110 on the Law Docket of said court, final judgment was rendered against the said The Arizona and New Mexico Railway Company for the sum of One Hundred Fifty (150) Dollars; and the said The Arizona and New Mexico Railway Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said H. E. Foley, defendant [50] in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, according to law within thirty days from the date hereof.

NOW, the condition of the above obligation is such that if said The Arizona and New Mexico Railway Company shall prosecute its writ of error

to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE ARIZONA AND NEW MEXICO
RAILWAY COMPANY.

By LEWIS & ELLIOTT,

By H. A. ELLIOTT,

Its General Attorneys.

Sureties:

CHAS. F. SOLOMON.

H. H. HOLBERT.

Approved this the 22d day of January, A. D.
1921.

WM. H. SAWTELLE,

Judge.

Witness as to sureties:

[Notarial Seal]

J. M. BAER,

Notary Public.

My commission expires August 24, 1924.

[Endorsed]: Bond. Filed January 22, 1921. C.
R. McFall, Clerk. [51]

In the United States District Court, in and for the
District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States, to the Honorable Judge of the United States for the District of Arizona, Tucson Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between The Arizona and New Mexico Railway Company, a corporation, plaintiff in error, and H. E. Foley, defendant in error, a manifest error has happened to the damage of The Arizona and New Mexico Railway Company, plaintiff in error, as by said Complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and [52] proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE,
Chief Justice of the United States, this 22d day of
January, A. D. 1921.

[Seal]

C. R. McFALL,
Clerk of the United States District Court for the
District of Arizona, Tucson Division.

Allowed this the 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
United States Judge. [53]

[Endorsed]: In the United States District Court,
in and for the District of Arizona, Tucson, Ari-
zona. At Law—No. 110. H. E. Foley, Plain-
tiff, vs. The Arizona and New Mexico Railway
Company, a Corporation, Defendant. Writ of Er-
ror. Filed January 22, 1921. C. R. McFall, Clerk.
[54]

In the United States District Court, in and for the
District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Citation on Writ of Error (Copy).

United States of America,
State of Arizona,—ss.

To H. E. Foley, Plaintiff Above Named, GREET-
ING:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, on the 21st day of February, 1921, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein the Arizona and New Mexico Railway Company, a corporation, is plaintiff in error, and H. E. Foley is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1921.

[Seal] WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [55]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Tucson, Arizona, January 22, 1921, and executed the same on January 22, 1921, by reading the writ over the telephone

to L. Kearney, attorney for the plaintiff at Clifton, Arizona.

Mr. Kearney also accepted service of the same by telephone.

J. P. DILLON,
United States Marshal.
By F. G. Hudson,
Deputy.

SUPPLEMENTAL RETURN OF U. S.
MARSHAL.

I further executed this writ January 28, 1921, at Clifton, Greenlee County, Arizona, by delivering to L. Kearney, personally, a true copy of the same, to which was attached a copy of "Citation on Writ of Error," a copy of "Bond," and copy of "Assignment of Errors."

This service was made upon L. Kearney by direction of Hon. E. W. Lewis, counsel for defendant.

J. P. DILLON,
United States Marshal.
By Harvey T. Grady,
Deputy.

[Endorsed]: Citation on Writ of Error. Filed Feb. 1, 1921. C. R. McCall, Clerk. By D. H. McFarland, Deputy Clerk. [56]

In the District Court of the United States for the
District of Arizona.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the District Court of the United
States, for the District of Arizona:

You are hereby requested to prepare a transcript
of the record in the above-entitled cause, to be filed
in the office of the clerk of the United States Cir-
cuit Court of Appeals for the Ninth Circuit, pur-
suant to the writ of error issued in said cause and
to incorporate into such transcript the portions of
the record indicated below, to wit:

- (1) Plaintiff's complaint.
- (2) Defendant's demurrer and answer.
- (3) Agreed statement of facts. [57]
- (4) Judgment filed July 22, 1920, by the clerk of
court.
- (5) Petition for writ of error.
- (6) Assignment of errors.
- (7) Order allowing writ of error.
- (8) Bond on writ of error.
- (9) Writ of error.

(10) Citation on writ of error.

(11) This praecipe.

You are also hereby requested to annex to said transcript, and transmit therewith to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the original writ of error, the original assignment of errors, and the original citation, together with the acknowledgment or return of service annexed thereto.

Dated this 8th day of February, 1921.

H. A. ELLIOTT,

ERNEST W. LEWIS,

Attorneys for Defendants.

Service of the foregoing praecipe is hereby acknowledged this _____ day of _____, 1921.

_____,
Attorney for Plaintiff. [58]

In the District Court of the United States for the
District of Arizona.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Affidavit of Service of Praeceptum of Record.

State of Arizona,
County of Greenlee,—ss.

Dave W. Ling, being first duly sworn, upon his oath deposes and says:

I.

That he is a resident of Clifton, County of Greenlee and State of Arizona, and citizen of the United States, over the age of twenty-one years.

II.

That on the 11th day of February, 1921, at the hour of five o'clock P. M., affiant served the hereto attached praecipe upon L. Kearney, attorney for defendant H. E. Foley, herein, by placing a true and correct copy of said praecipe under the front door of the office and residence of the said L. Kearney, at the town of Clifton, said county and state; that affiant found no person in charge of said office and residence at such time who would receive said paper, and was unable to gain admittance to said office and residence; that affiant was reliably informed and *and* believes the fact to be, that the said L. Kearney was at said time in the State of California. Further deponent saith not.

DAVE W. LING.

Subscribed and sworn to before me this 12th day of February, 1921.

[Notarial Seal]

A. A. ANDERSON,

Notary Public.

My commission expires January 14, 1923. [59]

[Endorsed]: Praecepte. Filed Feb. 17, 1921. C. R. McFall, Clerk. By D. H. McFarland, Deputy Clerk. [60]

Letter.

L. KEARNEY,
Attorney at Law,
Clifton, Arizona.

January 25, 1921.

Hon. Clerk U. S. Dist. Court,
Dist. of Ariz.

Dear Sir:

Am informed that case of H. E. Foley vs. The Arizona & New Mexico Railway Company is about to be, or has been, appealed to Circuit Court of Appeals, in that case, the Hon. Edward S. Farrington filed therein his opinion when he decided that case. I would very much like to have a copy of that opinion go up with the other papers in the case.

Oblige,

Yours very truly,

L. KEARNEY. [61]

In the District Court of the United States, for the
District of Arizona.

L.-110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFALL, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a corporation, Defendant, said case being L.-110 on the docket of said court.

I further certify that the foregoing 61 pages, numbered from 1 to 61, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, the original assignment of errors and the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Twenty-four & 60/100 Dollars (\$24.60), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 18th [62] day of February, A. D. 1921.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States
for the District of Arizona. [63]

In the United States District Court, in and for the
District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Arizona, Tucson Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The Arizona and New Mexico Railway Company, a corporation, plaintiff in error, and H. E. Foley, defendant in error, a manifest error has happened to the damage of The Arizona and New Mexico Railway Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and [64] proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE,
Chief Justice of the United States, this 22d day of
January, A. D. 1921.

[Seal]

C. R. McFALL,
Clerk of the United States District Court for the
District of Arizona, Tucson Division.

Allowed this the 22d day of January, A. D. 1921.

WM. H. SAWTELLE,
United States Judge. [65]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Writ of Error. Filed January 22, 1921. C. R. McFall, Clerk. [66]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,
Defendant.

Petition for Writ of Error (Original).

To the Honorable WM. H. SAWTELLE, Judge of the District Court Aforesaid:

Now comes The Arizona and New Mexico Railway Company, a corporation, the defendant above named, by its attorney, and respectfully shows that on the 6th day of July, 1920, the Court directed, and there was entered an order directing judgment to be entered in favor of plaintiff above named and against defendant above named, in accordance with

the prayer of plaintiff's complaint, and that on the 22d day of July, 1920, pursuant to said order, a final judgment was entered against your petitioner, the defendant above named, and in favor of plaintiff above named, in the sum of One Hundred and Fifty (\$150.00) Dollars, with interest at the rate of six per cent (6%) per annum until paid, together with plaintiff's costs and disbursements in the sum of Thirty (\$30) Dollars, with like interest thereon until paid.

Your petitioner, feeling itself aggrieved by the said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit [67] Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

H. A. ELLIOTT and
ERNEST W. LEWIS,

Attorneys for Petitioner in Error. [68]

In the United States District Court, in and for the
District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAIL-
WAY COMPANY, a Corporation,

Defendant.

Assignment of Errors (Original).

Comes now The Arizona and New Mexico Rail-
way Company, a corporation, by its attorneys, and
says:

That in the record and proceedings herein in the
United States District Court for the District of
Arizona there is manifest error to the great preju-
dice of The Arizona and New Mexico Railway
Company, a corporation, in this, to wit:

I.

That the trial Court erred in rendering and en-
tering judgment in favor of the plaintiff and
against the defendant in the sum of One Hundred
Fifty (150) Dollars, said sum being in excess of the
sum of Seventy-one 20/100 (\$71.20/100) Dollars) the
amount specified in the agreed statement of facts
as to the amount to which the plaintiff was entitled
in the event judgment should be granted in his
favor.

II.

That the trial Court erred in rendering and entering judgment in favor of the plaintiff and against the defendant in the sum of One Hundred Fifty (150) Dollars, interest and costs, or at all, for the reasons:

(a) That the temporary agreement, Schedule "D," [69] set forth in the agreed statement of facts, by its very terms was not an agreement in force or effect either at the date of the passage or the effective date of the Adamson Act, being the Act of September 3 and 5, 1916, Chapter 463, entitled "An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce and for other purposes," but, upon the contrary, the agreement then and thereafter in force was that set forth in Schedule "A" in said agreed statement of facts;

(b) That the judgment of said Court proceeded upon an erroneous construction of the said Adamson Act in this, that said Act contemplated the application of the standard eight-hour day to contracts in being at the date of the passage or effective date of the said Act, which, under the agreed statement of facts, is the agreement set forth in Schedule "A" therein, whereas the agreement, Schedule "D," to which the trial Court applied said Act, was in fact a *modus vivendi* pending the settlement of the controversy between the Railroad Brotherhoods and the Railway Managers throughout the United States and which controversy was determined by the passage of the said Adamson

Act; all of which fully appears in the agreed statement of facts.

III.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant for the reason that the defendant in paying its employees, and particularly plaintiff, on the basis of Schedule "A" with the Adamson Act applied thereto, and not upon Schedule "D" with the Adamson Act applied thereto, as was determined by the trial court to be its duty to do, did not thereby reduce the compensation of plaintiff below the standard day's wage in effect either at the passage of the Adamson Act or [70] its effective date and that the standard day's wage in effect at passage or on effective date of said Adamson Act was that provided by said Schedule "A."

IV.

That the Court erred in rendering judgment in favor of the plaintiff and against the defendant for the reason that the Adamson Act contemplates the enforcement of its provisions by penalty and affords no civil right of action to the employee for failure to comply therewith.

WHEREFORE, by reason of the errors aforesaid, said The Arizona and New Mexico Railway Company prays that the judgment rendered and entered in this action be voided, annulled and reversed and that said District Court of the United

States for the District of Arizona be directed to grant a new trial of said cause.

H. A. ELLIOTT,
ERNEST W. LEWIS,
Attorneys for Defendant. [71]

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Petition—Assignment of Errors. Filed January 22, 1921. C. R. McFall, Clerk. [72]

In the United States District Court, in and for the District of Arizona, Tucson Division.

AT LAW—No. 110.

H. E. FOLEY,

Plaintiff,

vs.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Defendant.

Citation on Writ of Error (Original).

United States of America,

State of Arizona,—ss.

To H. E. Foley, Plaintiff Above Named, GREETING:

YOU ARE HEREBY cited and admonished to be and appear at the United States Circuit Court

of Appeals for the Ninth Circuit at the City of San Francisco, State of California, on the 21st day of February, 1921, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein The Arizona and New Mexico Railway Company, a corporation, is plaintiff in error and H. E. Foley is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1921.

[Seal] WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [73]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Tucson, Arizona, January 22, 1921, and executed the same on January 22, 1921, by reading the writ over the telephone to L. Kearney, attorney for the plaintiff at Clifton, Arizona.

Mr. Kearney also accepted service of same by telephone.

J. P. DILLON,
United States Marshal.
By F. J. Hudson,
Deputy.

SUPPLEMENTAL RETURN OF U. S.
MARSHAL.

I further executed this writ January 28, 1921, at Clifton, Greenlee County, Arizona, by delivering to L. Kearney, personally a true copy of the same, to which was attached a copy of "Citation on Writ of Error," a copy of "Bond," and a copy of "Assignment of Errors."

This service was made upon L. Kearney by direction of Hon. E. W. Lewis, counsel for defendant.

J. P. DILLON,
United States Marshal.
By Harvey T. Grady,
Deputy.

[Endorsed]: In the United States District Court, in and for the District of Arizona, Tucson Division. At Law—No. 110. H. E. Foley, Plaintiff, vs. The Arizona and New Mexico Railway Company, a Corporation, Defendant. Citation on Writ of Error. Filed Feb. 1, 1921. C. R. McFall, Clerk. D. H. McFarland, Deputy Clerk. [74]

[Endorsed]: No. 3649. United States Circuit Court of Appeals for the Ninth Circuit. The Arizona and New Mexico Railway Company, a Corporation, Plaintiff in Error, vs. H. E. Foley, Defendant in Error. Transcript of Record. Upon Writ

of Error to the United States District Court of the District of Arizona.

Filed February 21, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

